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REVISITING THE RIGHT TO OFFEND FORTY YEARS AFTER *COHEN v. CALIFORNIA*: ONE CASE'S LEGACY ON FIRST AMENDMENT JURISPRUDENCE

BY CLAY CALVERT*

ABSTRACT

This article examines the lasting legacy of the United States Supreme Court's ruling in *Cohen v. California* upon its fortieth anniversary. After providing a primer on the case that draws from briefs filed by both Melville Nimmer (for Robert Paul Cohen) and Michael T. Sauer (for California), the article examines how subsequent rulings by the nation's High Court were influenced by the logic and reasoning of Justice Harlan's majority opinion in *Cohen*. The legacy, the article illustrates, is about far more than protecting offensive expression. The article then illustrates how lower courts, at both the state and federal level, have used *Cohen* to articulate a veritable laundry list of principles regarding First Amendment jurisprudence. The article concludes by considering how new technologies and the digital age may affect *Cohen's* future influence, as well as how President Barack Obama's call in January of 2011 for a more civil public discourse about political issues stands counterposed to the First Amendment rights provided by *Cohen*.

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INTRODUCTION

In December of 2010, the United States Court of Appeals for the Ninth Circuit upheld the right of Robert Norse to sue the Santa Cruz City Council for violating his First Amendment[1] right of free speech when he was ejected from a council meeting after giving its members a defiant, but "silent, Nazi salute."[2] In concurring with this pro-speech result, Alex Kozinski, Chief Judge of the Ninth Circuit, wryly observed that one particular council member "clearly wants Norse expelled because the 'Nazi salute' is 'against the dignity of this body and the decorum of this body' and not because of any disruption. *But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech.*"[3]

Not surprisingly, this assertion coincides with Kozinski's previous statements regarding the dangers of totalitarian-like suppression of speech.[4] Perhaps more importantly, in making his observation,

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1. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-six years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. Norse v. City of Santa Cruz, 629 F.3d 966, 970 (9th Cir. 2010).

3. *Id.* at 979 (Kozinski, C.J., concurring) (emphasis added).

4. For instance, in an interview conducted in August of 2002 by the author of this article, Judge Kozinski stated:

> One of the things—not the only thing, but one of the important things—that distinguishes us from a totalitarian government is that people are able to speak and criticize and to raise ideas and persuade other people. I think you lose other freedoms when the government can do things and the people can't criticize them. That's what happened in Nazi Germany. People were afraid to speak. I'd like to believe that if they had a stronger protection for speech, things would have been different. People would have been willing to speak out if they had protection for it, and then the people would have slowly regained their sanity.

Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 259, 270 (2003).

Kozinski cited for support[5] the United States Supreme Court's 1971 opinion in *Cohen v. California*.[6] The High Court in *Cohen* upheld the right of Paul Robert Cohen to wear a jacket emblazoned with the words "Fuck the Draft" in a Los Angeles courthouse corridor in April 1968 "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[7]

Judge Kozinski's citation of *Cohen* to buttress the use of indecorous and loutish expression is just one of many recent indicators[8] confirming the prophetic nature of the opening sentence of Justice John Marshall Harlan's majority opinion: "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance."[9]

The fortieth anniversary of the High Court's ruling in *Cohen* provides a propitious opportunity to examine the large and lasting constitutional significance of the case and its myriad contributions to today's First Amendment jurisprudence, some of which may not be readily evident. That is the purpose of this article.

Part I provides a brief overview of the facts of the case, the attorneys who litigated it, oral argument and the fractured nature of the Supreme Court's decision.[10] Importantly, Part I also blends in content from newspaper articles written at the time of the case, along with snippets from the briefs filed by both sides with the Court, to add richer context beyond the Court's opinion.

Next, Part II features two sections, the first of which argues that *Cohen's* reasoning and logic laid the groundwork for rulings in multiple subsequent High Court cases.[11] In particular, Section A of Part II analyzes seven different Supreme Court rulings that demonstrate *Cohen's* influence. Section B of Part II then illustrates that many lower courts continue to use and interpret *Cohen* to support their reasoning on a

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5. *Norse*, 629 F.3d at 979 (Kozinski, C.J., concurring) (citing Cohen v. California, 403 U.S. 15 (1971)).

6. 403 U.S. 15 (1971).

7. *See id.* at 16–17 (quoting People v. Cohen, 1 Cal. App. 3d 94, 97–98 (Cal. Ct. App. 1969), *rev'd sub nom.* Cohen v. California, 403 U.S. 15 (1971)).

8. *See infra* Part II.B (illustrating recent uses of *Cohen* in lower court rulings).

9. *Cohen*, 403 U.S. at 15.

10. *See infra* notes 13–82 and accompanying text.

11. *See infra* notes 83–283 and accompanying text.

wide range of speech-related subjects. Finally, Part III concludes by addressing the ways in which *Cohen's* legacy may be transformed in an era of digital communication and in light of recent calls for a more civil national political discourse following the mass shooting in Tuscon, Arizona, which wounded a U.S. Congresswoman and killed a federal judge, among others.[12]

I. A PRIMER ON *COHEN*

For some attorneys under the age of fifty years, there may be a propensity to recall *Cohen* from a constitutional law or First Amendment class simply as the "Fuck the Draft" case, much like the High Court's 2007 student-speech opinion in *Morse v. Frederick*[13] may be better known to some people as the "BONG HiTS 4 JESUS"[14] case. But a free-speech case, of course, involves more than just a memorable, attention-grabbing phrase. Thus, in reflecting back on *Cohen*, it is useful to dig deeper than Paul Robert Cohen's three-word message which, as First Amendment scholar and current Furman University President Rodney Smolla observes, "was manifestly metaphorical, as one cannot literally perform a sexual act with a federal agency."[15]

Section A below thus provides a brief background on the facts, attorneys and arguments in *Cohen v. California*. It assumes most law journal readers know the basic facts of the case, and thus it focuses on some other details that might easily be overlooked or perhaps forgotten. Section B then provides an overview of Justice Harlan's opinion for a five-Justice majority of the Court. Neither section is intended to be a comprehensive history of the case; instead, each section simply tees up the case for the analysis that follows in Part II.

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12. *See infra* notes 284–306 and accompanying text.

13. 551 U.S. 393 (2007).

14. *Id.* at 397. This was the phrase at the center of *Morse* that was written on a 14-foot banner unfurled by Joseph Frederick, a senior at Juneau-Douglas High School, as the Olympic Torch Relay passed by his high school on January 24, 2002. *Id.*

15. Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1633 (2005).

A. Prelude to the Supreme Court Ruling

This part initially articulates a few aspects of the case that are easily overlooked when examining it only from a simplified, black-letter law rendition of the facts. For instance, Cohen was in the Los Angeles County Courthouse on April 26, 1968 because he had been called to appear as a witness in a case—a fact that, as Stanford University Professor William Cohen observes, "does not appear in the record or court opinions."[16]

In addition, Paul Robert Cohen's jacket had other messages on it besides the infamous "Fuck the Draft" statement. In particular, it was adorned with "several peace symbols" and another three-word declaration, "Stop the War."[17] Such additional messages, which are not mentioned in the High Court's description of the jacket,[18] add context to Cohen's controversial declaration about the draft and thus support his testimony that he wore the jacket "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[19]

Cohen was represented by Melville Nimmer who, as University of Virginia Professor Robert O'Neil observes, "took on the cause as an American Civil Liberties Union volunteer"[20] at a time when he was "known mainly as a copyright expert."[21] The nation's High Court agreed to hear the case in June 1970, with a *Washington Post* article devoting only a single paragraph to the case at the time.[22]

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16. William Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595, 1596 n.7 (1987).

17. *Id.* at 1596.

18. *See* Cohen v. California, 403 U.S. 15–17 (1971) (quoting People v. Cohen, 1 Cal. App. 3d 94, 97–98 (Cal. Ct. App. 1969), *rev'd sub nom.* Cohen v. California, 403 U.S. 15 (1971)) (describing Cohen's jacket).

19. *Id.*

20. Robert M. O'Neil, *Tribute: The Neglected First Amendment Jurisprudence of the Second Justice Harlan*, 58 N.Y.U. ANN. SURV. AM. L. 57, 65 (2001).

21. *Id.*

22. *Burger Says He'll Put Law Before Precedent*, WASH. POST, June 23, 1970, at A2 (writing that "[t]he [C]ourt agreed to consider whether it is constitutional to base a conviction for 'disturbing the peace' on the behavior of Paul R. Cohen, who entered the Los Angeles County Courthouse wearing a jacket bearing the inscription 'F--- the Draft'").

Even with the case accepted, there still was some trepidation about whether, during oral argument, Nimmer would utter the word "fuck" and, if so, what the reaction would be from the Justices. As University of Chicago Professor Geoffrey R. Stone succinctly describes the scene:

> Chief Justice [Warren] Burger was very anxious about the oral argument. In 180 years of Supreme Court history, no one had ever uttered the word "fuck" in the Supreme Court chamber, and Burger was determined that it would not happen on his watch. Thus, as Nimmer approached the podium to begin his argument, the white-haired Burger leaned over the bench and said, "Mr. Nimmer, . . . the Court is thoroughly familiar with the factual setting of this case, and it will not be necessary for you . . . to dwell on the facts." To which Nimmer, understanding full well the importance of saying the word, replied, "At Mr. Chief Justice's suggestion
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> . . . I certainly will keep very brief the statement of facts . . . . What this young man did was to walk through a courthouse corridor . . . wearing a jacket upon which were inscribed the words 'Fuck the Draft.'"[23]

In his appellant brief on behalf of Paul Robert Cohen,[24] Nimmer began the "Summary of Argument" section simply by asserting that his client "was clearly engaging in speech, and such speech is entitled to First and Fourteenth Amendment protection because it neither contained nor was it accompanied by any of the elements which this Court has heretofore recognized as justifying the abridgement of freedom of speech."[25] The appellant's brief boldly contended that "[t]he fact that

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23. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 2 (2008) (alterations in original) (citing BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 128–29 (Simon and Schuster, 1979)).

24. Brief for Appellant, Cohen v. California, 403 U.S. 15 (1971) (No. 70-299).

25. *Id.* at 8.

Appellant's speech may have been offensive to some persons does not justify the abridgement of his speech. The First Amendment is equally applicable to offensive and non-offensive speech."[26]

What one might not recall is that Nimmer loaded the Brief for Appellant not simply with facts, but with free speech theory, asserting that "[f]undamental First Amendment [t]heory [r]equires [p]rotection for [s]peech [s]uch as that [e]mployed by Appellant."[27] In particular, he argued that his client's speech should be protected because: (1) it related to democratic self-governance; (2) allowed Paul Robert Cohen to reach self-fulfillment and self-realization; and (3) provided "a safety valve" for releasing steam that otherwise could result in violent conduct.[28] For practicing attorneys who may disparage the value of theory in the law, Nimmer's brief—and the result he coaxed from the Court—illustrates its clear relevance and importance.

Opposing Nimmer and representing California was Michael T. Sauer, a 1962 graduate of Loyola Law School in Los Angeles who, after "a two-year stint as a courthouse law clerk," worked for eight years as a "deputy city attorney in Los Angeles."[29] After *Cohen*, Sauer went on to become a California superior court judge, drawing news media attention in 2007 when he sentenced celebrity and hotel heiress Paris Hilton to forty-five days in jail on charges that "she violated her probation from an alcohol-related, reckless-driving conviction" in 2006.[30] Thus, rather than being remembered in our pop-culturally saturated society for his prosecution of Paul Robert Cohen or involvement in a seminal Supreme Court ruling, "after 35 years on the bench, Sauer's name will forever be linked with Hilton's."[31]

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26. *Id.* at 9.

27. *Id.* at 9, 31.

28. *See id.* at 31–45.

29. *See LA Judge in Paris Hilton Case Praised as Unflappable, Fair*, ASSOCIATED PRESS, June 8, 2007, *available at* Westlaw, 6/8/07 AP DATASTREAM 22:53:40 (providing a biography of Judge Sauer and reporting that "[i]n one of the cases Sauer argued before the Supreme Court as a city attorney, the justices reversed a 1968 disturbing the peace conviction against Paul Robert Cohen for appearing in a courthouse wearing a jacket bearing a strong expletive about the military draft").

30. Tirdad Derakhshani, *Party's Over: Paris Hilton Sentenced to 45 Days in Jail*, PHILADELPHIA INQUIRER, May 5, 2007, at C5.

31. Ashraf Khalil & J. Michael Kennedy, *Unfazed by His Judgment of Paris*, L.A. TIMES, May 8, 2007, at B1, *available at* Westlaw, 2007 WLNR 8792035.

Perhaps one of the more interesting aspects of Sauer's brief on behalf of California was its closing use of a parade-of-horrors argument about what surely would transpire if the Supreme Court ruled in favor of Paul Robert Cohen.[32] In particular, the Brief of Appellee asserted:

> If appellant's form of protest is deemed constitutionally protected, then one need merely imagine the type of signs that will be publicly displayed against private citizens. ("Fuck Catholics"; "Fuck Negroes"; "Fuck Whites"; "Fuck Jews";—signs carried in protest of these "groups"); against public institutions (a "Fuck the United States Congress" sign in protest over enactments of the National Legislature); or against public officials (a "Fuck Nixon" sign carried by an opponent of the war policies of the President of the United States; a "Fuck the Justices of the United States Supreme Court" sign displayed in protest of decisions rendered by this Honorable Court).[33]

Ultimately, this free speech fear mongering held little sway among a majority of the Justices. That the majority opinion, however, with its ringing endorsement of free expression, was written by Justice Harlan might, at first blush, seem somewhat surprising. After all, as Professor O'Neil observes, Harlan was a "normally conservative, erstwhile New York corporation lawyer, whose legacy is usually recognized in areas remote from free speech and press."[34] Professor Sanford Levinson, in fact, adds that Harlan was "usually regarded as one of the more staid justices."[35] Indeed, the day after the opinion in *Cohen*

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32. Brief of Appellee at 20–21, Cohen v. California, 403 U.S. 15 (1971) (No. 70-299).

33. *Id.*

34. O'Neil, *supra* note 20, at 57.

35. Sanford Levinson, *The Pedagogy of the First Amendment: Why Teaching About Freedom of Speech Raises Unique (and Perhaps Insurmountable) Problems for Conscientious Teachers and Their Students*, 52 UCLA L. REV. 1359, 1361 (2005).

was delivered, the *Washington Post* described Harlan as "the staid conservative who delivered the court's opinion."[36]

As for the current whereabouts of protagonist Paul Robert Cohen, the author of this article e-mailed David Nimmer, a Los Angeles-area attorney and the son of Mel Nimmer,[37] in January 2011 to inquire about his father's former client.[38] The younger Nimmer responded, "I get asked this from time to time — no, I'm afraid that the erstwhile First Amendment champion has fallen off the grid. Which may be symbolically appropriate[,] from some higher perspective."[39]

B. The Ruling

Reflecting on the structure of Justice Harlan's opinion, one finds a clear and logical approach that, after a simple rendition of the facts[40] and the holdings below,[41] and then dispensing with the jurisdictional issue, began by ruling out what the case was *not* about.[42] In particular, his initial process-of-elimination strategy was to prove that the case did

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36. *Court Curbs Libel Claim by Individuals in News*, WASH. POST, June 8, 1971, at A1.

37. David Nimmer's accolades include: Century City Bar Association "Intellectual Property Lawyer of the Year"; *Los Angeles Magazine's* Southern California "Super Lawyer" in 2006–2011; inclusion in *The Best Lawyers in America* for more than 15 years; and the *Los Angeles* and *San Francisco Daily Journals*' 2008 "Top 10 Copyright Lawyers" of California. *See* IRELL & MANELLA LLP: David Nimmer, http://www.irell.com/professionals-51.html (last visited Oct. 20, 2011).

38. E-mail from author to David Nimmer, of counsel to Irell & Manella LLP (Jan. 10, 2011, 16:50:00 PST) (on file with author).

39. E-mail from David Nimmer to author (Jan. 11, 2011, 00:47:00 PST) (on file with author).

40. *See* Cohen v. California, 403 U.S. 15, 16–17 (1971).

41. *See id.* (describing Cohen's conviction at the Municipal Court level in Los Angeles, the affirmance of that conviction by the Court of Appeal of California (Second Appellate District), and the California Supreme Court's decision not to review the case). *See also* People v. Cohen, 1 Cal. App. 3d 94, 104 (Cal. Ct. App. 1969), *rev'd sub nom.* Cohen v. California, 403 U.S. 15 (1971) (concluding that "the evidence was sufficient to support a conviction for disturbing the peace by means of offensive conduct as prohibited by section 415 of the Penal Code").

42. *See Cohen*, 403 U.S. at 17–18 (discussing jurisdiction and issues not raised in the case).

not fall within one of the few unprotected silos of speech[43] that are sometimes referred to "categorical carve-outs."[44] As Harlan put it, "[i]n order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present."[45]

In particular, Harlan quickly dismissed the notion that the case fell into the obscenity exception because obscenity "must be, in some significant way, erotic."[46] The message on Paul Robert Cohen's jacket was not erotic, Harlan wittily wrote, because it clearly would not "conjure up such psychic stimulation in anyone likely to be confronted with"[47] it.

Similarly, Harlan ruled out the case coming within the confines of the fighting words exception identified by the Supreme Court in *Chaplinsky v. New Hampshire*.[48] Paul Robert Cohen's words were not targeting any particular person and "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[49] As discussed later in this article, lower courts would find *Cohen's* articulation and interpretation of the fighting words doctrine useful in their own opinions.[50]

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43. The U.S. Supreme Court has identified several categories of speech that fall outside the ambit of First Amendment protection. *See* United States v. Stevens, ___ U.S. ___, ___, 130 S. Ct. 1577, 1584 (2010) (identifying categories of historically and traditionally unprotected content to include: (a) obscenity; (b) defamation; (c) fraud; (d) incitement; and (e) speech integral to criminal conduct); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.") (emphasis added).

44. Carey v. Wolnitzek, 614 F.3d 189, 199 (6th Cir. 2010).

45. *Cohen*, 403 U.S. at 18 (emphasis added).

46. *Id.* at 20.

47. *Id.*

48. 315 U.S. 568 (1942). In *Chaplinsky*, the Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

49. *Cohen*, 403 U.S. at 20.

50. *See infra* Part II.B.3.

Finally, Justice Harlan dispensed with the idea that the case fit within the incitement-to-violence exception,[51] observing that the Court was not faced with "an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction."[52] Harlan noted that there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result."[53]

After eliminating the possibility that the facts fit within one of these three exceptions to the First Amendment freedom of speech, Justice Harlan concisely framed the issue before the High Court:

> [T]he issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.[54]

This parsing of the issue left California with two possible rationales to support its punishment of Paul Robert Cohen's otherwise protected expression: (1) his speech was inherently likely to cause violence and thus needed to be squelched; or (2) his speech breached accepted standards of public morality and therefore could be punished. The majority swiftly disposed of the first line of logic, reasoning that "[w]e have been shown no evidence that substantial numbers of citizens

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51. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

52. *Cohen*, 403 U.S. at 20.

53. *Id.*

54. *Id.* at 22–23.

are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen."[55]

As for the second argument, Justice Harlan began by acknowledging it was more complicated than the first, admitting that "it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic."[56] But in ruling for Paul Robert Cohen, Justice Harlan articulated a laundry list of reasons why the First Amendment should prevail, the highlights of which are encapsulated in the bullet point descriptions below:

• ***Tolerance of Offensive Expression Demonstrates Strength, Not Weakness, in a Democratic Society***: As Justice Harlan wrote, "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength," adding that "[w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."[57] Whether or not Harlan's opinion was influenced by it, it will be recalled from earlier that Mel Nimmer's appellant brief specifically launched a free speech theory argument that his client's speech deserved protection in a democratic society.[58]

• ***Government Line-Drawing is Impossible When It Comes to Defining What is and is not Offensive***: Justice Harlan rhetorically queried, "How is one to distinguish this from any other offensive word?"[59] He also added that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."[60] This principle, of course, comports with the modern-day void for vagueness doctrine.[61]

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55. *Id.* at 23.
56. *Id.*
57. *Id.* at 25.
58. *See supra* notes 27–28.
59. *Cohen*, 403 U.S. at 25.
60. *Id.*
61. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (observing that "[i]t is a basic principle of due process that an enactment is void for vagueness if its

• ***It is Necessary to Protect the Emotional Impact of Speech, Not Simply Its Literal Meaning***: Justice Harlan stressed that the facts of the case "well illustrated"[62] the point that "that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[63] Put differently, uttering "Fuck the Draft" deserves protection because its emotional power that an alternative message such as "The Draft is Bad" simply cannot muster.

• ***Beware of the Government's Pretext of Protecting Public Morality When the Real Aim is Viewpoint-Based Censorship***: Intimating the danger that the government might attempt to cloak its efforts to squelch Paul Robert Cohen's anti-government viewpoint behind the seemingly more virtuous veil of protecting morality during the turbulent and culturally transformative Vietnam War era, Justice Harlan wrote that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[64]

University of Chicago constitutional law scholar Geoffrey Stone referred to this last argument in a 2009 article as the "pretext effect,"[65] explaining that:

> government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to

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prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 941 (3d ed. 2006) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated.").

62. *Cohen*, 403 U.S. at 26.

63. *Id.*

64. *Id.*

65. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 277 (2009).

> suppress ideas they do not like. The pretext effect is not unique to the realm of free speech, but it is especially potent in this context, because public officials will often be sorely tempted to silence dissent in order to insulate themselves from criticism and preserve their own authority.[66]

• ***A Self-Help Remedy, Not Censorship, is the Solution When the Speech Occurs in a Non-Captive Audience, Public Location***: Emphasizing the contextual importance of the location of Cohen's expression (in a public place rather than a private one), Justice Harlan wrote that individuals "confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[67]

This self-help perspective actually was suggested by Mel Nimmer during oral argument when, in responding to a query by Justice Thurgood Marshall, Nimmer nimbly replied, "Your Honor, it was on his jacket, which meant that a person, if he wishes to, could see it on his jacket. But a person was not forced to continue to observe that, as in terms of a loud noise where one can't help but hear it."[68] In other words, the mode of expression—written versus spoken—makes a critical contextual difference—non-captive audience versus captive audience—in determining whether it will be protected.

Ultimately, the totality of these multiple arguments led the five-Justice majority of Justices Harlan, William O. Douglas, William Brennan, Potter Stewart and Thurgood Marshall, to conclude that California could "not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."[69]

In stark contrast stood a three-Justice dissent authored by Justice Harry A. Blackmun, a Richard Nixon appointee who only recently had

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66. *Id.*

67. *Cohen*, 403 U.S. at 21.

68. *See* PETER IRONS, MAY IT PLEASE THE COURT: THE FIRST AMENDMENT 71 (Peter Irons ed., 1997) (quoting from the transcript of the oral argument).

69. *Cohen*, 403 U.S. at 26.

joined the Court,[70] and joined by Chief Justice Warren Burger and Justice Hugo Black.[71] Deploying a speech-versus-conduct dichotomy in order to foist the case outside of the realm of First Amendment protection, Blackmun initially determined that the case was about "mainly conduct and little speech."[72] He added, however, that even if the case really was about speech, Cohen's jacket nonetheless fell within the scope of the fighting words doctrine and thus was not protected by the First Amendment.[73] Openly deriding Paul Robert Cohen's wearing of the jacket as an "absurd and immature antic,"[74] and seemingly attacking the majority's "agonizing over First Amendment values"[75]—as if free speech theory were seemingly irrelevant—as "misplaced and unnecessary,"[76] it seems fair to characterize Justice Blackmun's brief dissent, at least to this point, as curt, if not completely caustic.

Justice Blackmun, however, added a second line of reasoning to his dissent—a line of reasoning in which Justice Byron White concurred.[77] Blackmun contended that if the High Court did not dismiss the case against Paul Robert Cohen, then it should be remanded to be considered in light of the California Supreme Court's ruling in *In re Bushman*.[78] *Bushman* also dealt with the constitutionality and interpretation of the same California Penal Code section under which Paul Robert Cohen was prosecuted, but it was handed down after the

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70. *See* Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 125 (1995) (noting that "Blackmun was nominated for a position on the Supreme Court in 1970 by President Richard M. Nixon," and adding that "[a]lthough Blackmun was not irredeemably conservative and there were some issues, such as exclusion of minorities from juries, on which he was consistently liberal throughout his Court tenure, he remained pretty much a law-and-order justice").

71. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.* at 28 (writing that Justice White "concurs in Paragraph 2 of Mr. Justice Blackmun's dissenting opinion").

78. 463 P.2d 727 (Cal. 1970).

California high court declined to review the California appellate court's affirmance[79] of Cohen's conviction.[80]

When the ruling came down, the *New York Times* devoted merely one scant paragraph to the decision, writing simply that the Court:

> Ruled, 5 to 4, that California violated the Constitution's free speech guarantee when it convicted a young man of "offensive conduct" for wearing a jacket inscribed on the back with a four-letter vulgarism denouncing the draft. (No. 299, Cohen v. California). Dissenting: Burger, Blackmun, Black, White.[81]

The opinion, of course, would turn out to occupy much more space in constitutional law casebooks[82] and, as this article describes in the next part, it would influence First Amendment jurisprudence at both the High Court and lower court levels for years to come.

II. THE LASTING INFLUENCE OF *COHEN*: FROM SUPREME COURT DECISIONS TO RECENT LOWER COURT RULINGS

This part has two sections. Section A initially illustrates *Cohen*'s influence on seven major Supreme Court opinions handed down over the past forty years. Section B then turns to lower court rulings, both recent and of older vintage, that have been influenced and shaped in some manner by the logic and reasoning of Justice Harlan's majority opinion in Cohen.

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79. People v. Cohen, 1 Cal. App. 3d 94 (Cal. Ct. App. 1969), *rev'd sub nom.* Cohen v. California, 403 U.S. 15 (1971).

80. *See Cohen*, 403 U.S. at 28 (Blackmun, J., dissenting) ("Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman*.").

81. *Supreme Court's Actions*, N.Y. TIMES, June 8, 1971, at A16.

82. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1201–04 (6th ed. 2009) (setting forth an edited version of *Cohen*).

A. Cohen's *Influence on Subsequent Supreme Court Rulings: A Septet of Critical Cases Across a Range of Issues*

While the Supreme Court's decision in *Cohen* has influenced many of the High Court's later rulings not included in the discussion below,[83] this section concentrates on seven different cases. They are selected because they highlight or illustrate the different ways in which *Cohen* is influential on modern-day First Amendment jurisprudence. In some instances, the cases explicitly cite *Cohen*, while in others it is the logic and reasoning of the High Court that closely tracks or mirrors *Cohen*, despite the lack of any direct citation to it. The seven cases are discussed in chronological order, starting with the oldest of the opinions.

1. *Federal Communications Commission v. Pacifica Foundation*[84]

In 1978, the Supreme Court cited *Cohen* to support its decision affirming the Federal Communications Commission's power to fine over-the-air radio and television broadcasters when they transmit explicit

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83. *See, e.g.*, Holder v. Humanitarian Law Project, ___ U.S. ___, ___, 130 S. Ct. 2705, 2724 (2010) (using *Cohen* to illustrate the point that, when a generally applicable regulation that targets conduct also has the effect of restricting speech, more rigorous First Amendment scrutiny is applied beyond that of the intermediate scrutiny standard); FCC v. Fox Television Stations, Inc., 556 U.S. ___, ___, 129 S. Ct. 1800, 1829 (2009) (Ginsburg, J., dissenting) (citing *Cohen's* language about the emotive function of speech to support the proposition that "[s]pontaneous utterances used simply to *convey an emotion or intensify a statement* fall within" the sweep of an FCC order targeting indecency) (emphasis added); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–11 (1975) (addressing the constitutionality of a local ordinance that prohibited showing films containing nudity by a drive-in movie theater when its screen was visible from a public street or place, and quoting *Cohen* for the proposition that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes'" and adding, under *Cohen*-like logic, that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer"); Hess v. Indiana, 414 U.S. 105, 107 (1973) (per curiam) (citing *Cohen* when considering the scope of both obscenity and the fighting words doctrine, and noting that, after *Cohen*, to classify the phrase "We'll take the fucking street later" as obscene "would not be tenable").

84. 438 U.S. 726 (1978).

content that is indecent,[85] yet not obscene,[86] during specific times of the day when children are likely to be in the audience.[87] In particular, the Court cited *Cohen* to illustrate "[t]he importance of context"[88] in which speech occurs in order to determine if its censorship and punishment are justified. In a nutshell, *Pacifica Foundation* made it clear that *Cohen* would not always protect offensive speech — any time, any where — but rather that it would be limited in its lasting effect by its specific factual pattern.

Thus, in classic compare-and-contrast fashion, Justice John Paul Stevens explained for the majority in *Pacifica Foundation* that:

> [i]n holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that

85. The FCC today defines indecent content as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." Federal Communications Commission, *Obscene, Indecent and Profane Broadcasts*, FFC Consumer Facts, 1, http://transition.fcc.gov/cgb/consumerfacts/obscene.pdf. The FCC specifies on its website that "[i]ndecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity." *Id.*

86. Obscenity is one of the few categories of expression that is not protected by the First Amendment's guarantee of free speech. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (writing that "obscenity is not within the area of constitutionally protected speech or press"). The Supreme Court's current three-part test for obscenity asks the factfinder to determine if the material in question: (1) "appeals to a prurient interest" in sex, when taken as a whole and as judged by "contemporary community standards" from the perspective of the average person; (2) is "patently offensive," as defined by state law; and (3) "lacks serious literary, artistic, political or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

87. FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978).

88. *Id.* at 747 n.25.

> this afternoon broadcast was likely to offend listeners.[89]

The offending message in *Cohen* was protected, in large part, because of what the author of this article refers to as the three "p" contextual factors. In particular, they are:

- ***political*** in content;
- ***public*** in location; and
- ***passive*** (written, rather than spoken) in conveyance.

Elaborating on this trio of contextual factors, the Court wrote in *Cohen* that:

> persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.[90]

Seven years later, in *Pacifica Foundation*, it was of great concern to the High Court that the offending speech in question could intrude into "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[91] Furthermore, the fact that the speech in *Pacifica Foundation* was active (spoken) rather than passive (written) made a critical difference, with the Court noting the danger of George Carlin's comedic recording for "those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have

89. *Id.* (quoting Cohen v. California, 403 U.S. 15, 22 (1971)).

90. *Cohen*, 403 U.S. at 21–22 (1971).

91. *Pacifica Found.*, 438 U.S. at 748 (citing Rowan v. Post Office Dept., 397 U.S. 728 (1970)).

enlarged a child's vocabulary in an instant."[92] In brief, the complete context of speech—its content, location and mode—all affect the amount of First Amendment protection it receives. *Pacifica Foundation* thus made it clear that *Cohen* did not protect all profanity—any time, any manner and anywhere—but, instead, was much more limited by its factual context.

The bottom line here is laced with irony—a profoundly pro-speech decision in *Cohen* was used to justify the punishment of expression in *Pacifica Foundation*. Yet the most profound irony resulting from this contextual-based approach to speech protection may be yet to come.

In particular, the Supreme Court in *Pacifica Foundation*, directly citing *Cohen*, wrote that the value of speech and its capacity to offend "vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Justice Harlan, one occasion's lyric is another's vulgarity."[93] The paraphrase, of course, is to Justice Harlan's observation in *Cohen* that:

> while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that *one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.*[94]

This language from *Cohen* taps directly into the problem of vagueness at the heart of California's statutory attempt to punish Paul Robert Cohen for "offensive conduct."[95] In other words, while the word "fuck" may be offensive to some people, it may not be so for others because it ultimately boils down to a matter of individual "taste and style."[96] A statute that attempts to punish "offensive" speech thus is

92. *Id.* at 749–50 (noting the easy access children have to broadcasting, the government's interest in the well-being of its youth, and the parent's claim to authority in their own home).

93. *Id.* at 747.

94. *Cohen*, 403 U.S. at 25 (emphasis added).

95. *Id.* at 16.

96. *Id.* at 25.

inherently vague because, when it comes to the potential of language to offend, "governmental officials cannot make principled distinctions."[97] As the Court rhetorically queried in *Cohen*, "How is one to distinguish this from any other offensive word?"[98]

The irony is that the FCC's indecency regime that was sustained in *Pacifica Foundation* in 1978 now teeters in 2011 on what could be the brink of its demise precisely due to the exact same type of vagueness issues that troubled California's statute in *Cohen*. Specifically, the United States Court of Appeals for the Second Circuit ruled in 2010 in *Fox Television Stations, Inc. v. Federal Communications Commission*[99] that "the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here."[100] In holding that "the FCC's indecency policy is unconstitutional because it is impermissibly vague,"[101] the Second Circuit reasoned that "[t]he first problem arises in *the FCC's determination as to which words or expressions are patently offensive*. For instance, while the FCC concluded that 'bullshit' in a 'NYPD Blue' episode was patently offensive, it concluded that 'dick' and 'dickhead' were not."[102]

In other words, just as California's statute targeting offensive conduct was so vague as to prevent principled distinctions from being made between certain words,[103] so too is the FCC's current definition of indecency targeting patently offensive content so vague as to prevent its enforcement. Thus, in hindsight, Justice Stevens' invocation and

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97. *Id.*

98. *Id.*

99. 613 F.3d 317 (2d Cir. 2010), *cert. granted in part*, ___ U.S. ___, 131 S. Ct. 3065 (2011).

100. *Id.* at 319.

101. *Id.* at 327.

102. *Id.* at 330 (emphasis added). In August of 2010, the FCC petitioned the Second Circuit for a rehearing of the case. *See* Ted Johnson, *FCC Battles for Control*, DAILY VARIETY, Aug. 27, 2010, at 1, 60 (calling the filing of the appeal "the clearest acknowledgement yet by the Federal Communications Commission that its ability to restrict indecent content may be in jeopardy, particularly if the case lands in the Supreme Court," and adding that "[t]he FCC request for a rehearing, rather than an appeal directly to the Supreme Court, essentially buys time in a legal battle that may very well end up at the high court anyway").

103. *See supra* notes 60–61 and accompanying text.

paraphrase in *Pacifica Foundation* of *Cohen's* "one man's vulgarity is another's lyric"[104] line of logic to support the FCC's regulation of indecency may not have been so wise or prudent after all because the same reasoning could result in the downfall of the Commission's current authority over indecent expression.

2. *Bethel School District No. 403 v. Fraser*[105]

In 1986, the United States Supreme Court dealt a blow to the First Amendment speech rights of public school students when it held in *Bethel School District v. Fraser* that school officials may punish students for engaging in sexually lewd, vulgar and indecent speech.[106] In chipping away at the student speech rights it had recognized seventeen years earlier in *Tinker v. Des Moines Independent Community School District*,[107] the Court in *Fraser* used *Cohen* much as it did in *Pacifica Foundation*—as a compare-and-contrast foil for illustrating that contextual cues are largely determinative of the extent of protection speech receives.

In *Fraser*, the critical contextual factors included: (1) the ***content*** of the speech (sexual rather than political); (2) the ***location*** of the speech (in school rather than out of school); and (3) the nature of the ***audience*** toward whom the speech is directed (minors rather than adults). Specifically, the Court wrote:

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104. Cohen v. California, 403 U.S. 15, 25 (1971).

105. 478 U.S. 675 (1986).

106. The Court opined in *Fraser* that:

> [t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Id. at 685–86.

107. 393 U.S. 503 (1969).

> The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen* v. *California*, 403 U.S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.[108]

While simultaneously using *Cohen* as a counterpoint against which to contrast the facts in *Fraser* and thereby to justify the school's punishment of Matthew Fraser for giving a speech laden with sexual innuendoes during a high school assembly,[109] Chief Justice Burger's majority opinion also appears to somewhat subtly undermine the importance of *Cohen* as precedent by referring to it as the product of a "sharply divided Court."[110] Although accurate regarding the fractured nature of the *Cohen* Court,[111] deployment of the phrase "sharply divided" might have been a rhetorical attempt to limit the power of Justice Harlan's majority opinion.

In a very real sense, then, Chief Justice Burger in *Fraser* cabins and confines the scope of *Cohen* only to cases involving political speech that is made in public places and that plays a role in "adult public discourse."[112] Read more broadly, the majority in *Fraser* uses *Cohen* as a tool to draw a clear dichotomy between the rights of adults and children when it comes to the use of offensive language, with Burger quoting a

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108. *Fraser*, 478 U.S. at 682.

109. In nominating a classmate, Jeff Kuhlman, for a student-government office, "Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677–78. Among other things, Fraser stated, "Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts--he drives hard, pushing and pushing until finally—he succeeds." *Id.* at 687 (Brennan, J., concurring) (citation omitted).

110. *Id.* at 682 (majority opinion).

111. *See supra* notes 70–78 and accompanying text (describing the breakdown of the Justices and opinions in *Cohen*).

112. *Fraser*, 478 U.S. at 682.

lower court opinion approvingly for the proposition that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[113]

In his concurring opinion, however, Justice William Brennan relied on *Cohen* to make it clear that location—not the age of the speaker—was the determinative contextual factor in *Fraser*. Brennan wrote that if Matthew Fraser "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . [T]he Court's opinion does not suggest otherwise."[114]

Justice Brennan's point, in fact, would bear fruit decades later in the Supreme Court's 2007 student speech case of *Morse v. Frederick*.[115] Writing the opinion of the Court in *Morse*, Chief Justice John Roberts noted that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[116]

The bottom line, whether it be Chief Justice Burger's majority opinion or Justice Brennan's concurrence, is that *Cohen* helped to provide a contextual, comparison point for the Supreme Court in *Fraser* in defining the extent of the in-school speech rights of minors.

3. *Hustler Magazine v. Falwell*[117]

Seventeen years after the Supreme Court in *Cohen* affirmed First Amendment protection against criminal penalties for engaging in offensive speech critical of government policies (namely, the draft and the war in Vietnam), it extended First Amendment protection against tort liability[118] for engaging in offensive, hyperbolic speech critical of public figures and public officials.[119]

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113. *Id.* (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

114. *Id.* at 688 (Brennan, J., concurring) (citing Cohen v. California, 403 U.S. 15 (1971)).

115. 551 U.S. 393 (2007).

116. *Id.* at 405 (citing *Cohen,* 403 U.S. 15).

117. 485 U.S. 46 (1988).

118. The tort at issue in *Hustler Magazine v. Falwell* was intentional infliction of emotional distress. *See id.* at 48 (framing the issue as whether an award of damages for intentional infliction of emotional distress "is consistent with the First

Although the Supreme Court in *Falwell* never once directly cites it, *Cohen* arguably lays the foundation for *Falwell* in three key ways. First, the speech in both cases was not meant to be taken literally. As noted earlier, the speech of Paul Robert Cohen "was manifestly metaphorical, as one cannot literally perform a sexual act with a federal agency."[120] Likewise, the speech at issue in *Falwell* was labeled as an ad parody.[121]

Second, just as Paul Robert Cohen could have engaged in more genteel speech by scrawling "I object to the draft" on his jacket rather than "Fuck the Draft," so too could *Hustler* and its controversial publisher, Larry Claxton Flynt,[122] have expressed the more refined sentiment, "Jerry Falwell is a hypocrite who does not believe what he preaches." Instead, Flynt chose to, bluntly and much more abrasively, put the following words in the mouth of Jerry Falwell during the course of a fictional interview about his first time having sex: "I always get sloshed before I go out to the pulpit. You don't think I could lay down all that

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and Fourteenth Amendments of the United States Constitution"). Intentional infliction of emotional distress typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress[,] and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

119. Although the case did not involve a public official, the Court nonetheless concluded in *Falwell* that:

> *public figures* and *public officials* may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Falwell, 485 U.S. at 56 (emphases added).

120. Smolla, *supra* note 15, at 1633.

121. *See Falwell*, 485 U.S. at 48.

122. *See generally* Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Man in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159 (2001) (providing biographical information on Larry Flynt and the content of an in-depth, in-person interview conducted with him in December 2000 in his Beverly Hills, California office).

bullshit sober, do you?"[123] University of Virginia Professor Frederick Schauer recently referred to the speech of both Paul Robert Cohen and Larry Flynt by the same derisive, shorthand moniker—"juvenile criticism."[124]

For Flynt, who seemingly has a made it a primary life goal to expose and ridicule individuals in public life and politics whom he perceives to be hypocrites,[125] the use of such juvenile mocking and profanity—the term bullshit—was a powerful way of conveying his message that Jerry Falwell was a hypocrite. The Supreme Court's support for such blunt, candid and shocking talk stems from *Cohen's* recognition "that much linguistic expression serves a dual communicative function"[126] and that:

> words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[127]

Third and finally, *Cohen* arguably lays the groundwork for the *Falwell* Court's recognition that subjectivity in the meaning and interpretation of language prevents the government, at least in some cases, from drawing clear lines that separate protected from unprotected expression.[128] Specifically, for the tort of intentional infliction of emotional distress ("IIED") at issue in *Falwell*, a key element is the

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123. *See* Hustler Magazine v. Falwell, MedLibrary.org, http://medlibrary.org/medwiki/Hustler_Magazine_v._Falwell#External Links (last visited Oct. 27, 2011) (setting forth the text of the ad parody).

124. Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 212 n.24 (2007).

125. *See generally* Clay Calvert, *Democracy & the Discourse of Distrust: Explicating the Hypocrisy Exposition Value in First Amendment Jurisprudence*, 32 T. JEFFERSON L. REV. 177, 177–80 (2010) (describing Flynt's efforts to out hypocrites); *See id.* at 177 (quoting LARRY FLYNT, SEX, LIES & POLITICS: THE NAKED TRUTH XVI (2004)) ("I'm an opponent of hypocrisy, not sex.").

126. Cohen v. California, 403 U.S. 15, 26 (1971).

127. *Id.*

128. *See infra* notes 130–32 and accompanying text.

outrageousness of the conduct or the speech of the defendant.[129] Yet Chief Justice William Rehnquist reasoned in *Falwell*:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[130]

This reasoning parallels the Court's observation seventeen years before in *Cohen* that it is "often true that one man's vulgarity is another's lyric"[131] and its related rhetorical query, "How is one to distinguish this from any other offensive word?"[132] In brief, the *Cohen* Court's problems with the amorphous term "offensive" in the California statute at issue in that case undergird the *Falwell* Court's troubles with the equally nebulous concept of outrageousness in the IIED tort.

Ultimately, in comparison with both *Pacifica Foundation* and *Fraser* in which *Cohen* was used as a counterfactual foil to justify the punishment of speech, *Falwell* tracks *Cohen's* logic and reasoning in a trio of different ways to deliver a free speech victory.

4. *Texas v. Johnson*[133]

In 1989, a fractured Supreme Court upheld the First Amendment right of citizens to burn the American flag as a form of symbolic[134]

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129. *See* Hustler Magazine, Inc., v. Falwell, 485 U.S. 46, 53 (1988) (considering it "quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently '*outrageous*'") (emphasis added).

130. *Id.* at 55.

131. *Cohen*, 403 U.S. at 25.

132. *Id.*

133. 491 U.S. 397 (1989).

134. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (observing that "the First Amendment affords protection to symbolic or expressive conduct as well as to actual speech").

political expression.[135] If *Cohen* laid the groundwork for protecting the "emotive function"[136] of speech, particularly when engaged in at a public venue where onlookers have a lesser expectation of privacy,[137] then Gregory Lee Johnson took full advantage of it when he burned an American flag outside of the 1984 Republican Party Convention just as President Ronald Reagan was being re-nominated.[138] While Paul Robert Cohen used the word "fuck" to demonstrate the depths of his feelings about the draft and war in Vietnam,[139] Johnson torched a flag because, in his words, "a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."[140] Thus, while "fuck" is a powerful word that Cohen exploited, the American flag has what Justice Brennan characterized as a "uniquely persuasive power"[141] that Johnson exploited.

Cohen and *Johnson* are linked, statutorily speaking, by the concept of offense and, judicially speaking, by the Court's rejection of offense taken at a particular viewpoint as sufficient grounds for criminally punishing an individual. Specifically, while the California statute under which Paul Robert Cohen was prosecuted targeted "*offensive conduct*,"[142] the Texas statute under which Gregory Lee

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135. *See Johnson*, 491 U.S. at 399 (writing that "[a]fter publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.").

136. *Cohen*, 403 U.S. at 26.

137. *See id.* at 21–22 (noting that "while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home").

138. *Johnson*, 491 U.S. at 406.

139. *See Cohen*, 403 U.S. at 16 (noting that Paul Robert Cohen "'testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft'" (quoting People v. Cohen, 1 Cal. App. 3d 94, 97–98 (Cal. Ct. App. 1969), *rev'd sub nom.* Cohen v. California, 403 U.S. 15 (1971))).

140. *Johnson*, 491 U.S. at 406.

141. *Id.* at 420.

142. *See Cohen*, 403 U.S. at 16 (observing that "Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415

Johnson was charged targeted burning a flag "in a way that the actor knows *will seriously offend* one or more persons likely to observe or discover his action."[143] But just as Justice Harlan in *Cohen* recognized that the government cannot "force persons [such as Paul Robert Cohen] who wish to ventilate their dissident views into avoiding particular forms of expression"[144] simply because they might offend or lead to violence, Justice Brennan in *Johnson* reasoned that a major "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[145] *Cohen* and *Johnson* thus represent triumphs for the right of speakers to provocatively spark dissent and, concomitantly, defeats for the right of audience members to be free from offense.

Justice David Souter thus would use *Cohen*, more than a dozen years after *Johnson* built upon this line of logic, to support the proposition that "merely protecting listeners from offense at the message is not a legitimate interest of the government."[146]

Furthermore, there is another way in which *Cohen* arguably lays the groundwork for part of the majority's reasoning in *Johnson*. Specifically, *Cohen* may be read as an opinion premised on what this article calls a ***strength-through-tolerance rationale***, with the Court writing in *Cohen* that the fact that:

> the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a

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which prohibits 'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . *offensive conduct* . . . .'") *Id.* (quoting CAL. PENAL CODE § 415 (West 1970) (repealed and reenacted 1974)) (emphasis added)).

143. *Johnson*, 491 U.S. at 400 n.1 (emphasis added).

144. *Cohen*, 403 U.S. at 23.

145. *Johnson*, 491 U.S. at 408–09 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

146. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

> privilege, these fundamental societal values are truly implicated.[147]

In *Johnson*, the air was literally filled with the flames of a stolen American flag,[148] but Justice Brennan opined that:

> the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of *the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength.*[149]

When read collectively, the decisions in *Cohen* and *Johnson* thus embrace First Amendment scholar Lee Bollinger's notion of a "tolerant society,"[150] or one in which extreme and offensive views are tolerated. As an example, Bollinger asserts that protecting the expression of Nazi beliefs is pivotal because it reinforces American society's commitment to tolerance.[151] Bollinger writes, "free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[152]

5. *R.A.V. v. City of St. Paul*[153]

The Supreme Court in 1992 held that a St. Paul, Minnesota disorderly conduct ordinance targeting cross burning done with knowledge that it will cause "anger, alarm or resentment in others on the

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147. *Cohen*, 403 U.S. at 25.

148. *See Johnson*, 491 U.S. at 399 (noting that Johnson burned "an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings").

149. *Id.* at 419 (emphasis added).

150. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

151. Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 629–31 (1982).

152. BOLLINGER, *supra* note 150, at 10.

153. 505 U.S. 377 (1992).

basis of race, color, creed, religion or gender"[154] was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[155]

In concurring with the opinion of the Court, Justice Byron White cited *Cohen* to support the proposition that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[156] Because the St. Paul ordinance made "criminal expressive conduct that causes only hurt feelings, offense, or resentment,"[157] Justice White, joined in full by Justices Harry Blackmun and Sandra Day O'Connor and in part by Justice John Paul Stevens, concluded it was "fatally overbroad and invalid on its face."[158]

Cohen also is cited in *R.A.V.* to illustrate the Court's gradual limiting of the scope of the fighting words doctrine after *Chaplinsky*. In particular, Justice Stevens deploys *Cohen* in his concurring opinion to support the statement that "we have consistently construed the 'fighting words' exception set forth in *Chaplinsky* narrowly."[159] As illustrated later in this article, lower courts also have used *Cohen* when they attempt to define the ambit of fighting words.[160]

It will be recalled that in *Cohen*, Justice Harlan began his attempt to frame the issue by ruling out what the case was not about, and fighting words was one of those unprotected categories of speech into which Harlan determined the facts in *Cohen* did not fit.[161]

6. *Hill v. Colorado*[162]

In 2000, the Supreme Court ruled on the constitutionality of a Colorado statute that restricted the speech rights of anti-abortion

154. *See id.* at 380 (quoting the complete terms of the ordinance).

155. *Id.* at 381.

156. *Id.* at 414 (White, J., concurring) (citing, among other cases, Cohen v. California, 403 U.S. 15, 20 (1971)).

157. *Id.*

158. *Id.*

159. *Id.* at 428 (Stevens, J., concurring).

160. *See infra* Part II.B.3.

161. *See supra* notes 49–51 and accompanying text.

162. 530 U.S. 703 (2000).

protestors "within 100 feet of the entrance to any health care facility"[163] by prohibiting them from knowingly approaching "another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[164]

Much as *Cohen*, and later, *Johnson*,[165] pitted the First Amendment right of speakers against the audience's right to avoid offensive and unwanted expression, the issue framed in *Hill* by the Supreme Court was "whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener."[166] In determining if the Colorado statute struck "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners,"[167] the Court turned to *Cohen* to suggest that the right to engage in offensive and unwanted expression is highly fact specific and dependent upon the context in which the speech is used.[168]

Quoting *Cohen*, Justice Stevens wrote for the *Hill* majority that "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it."[169] As with its earlier decisions in *Pacifica Foundation*[170] and *Fraser*[171] discussed above, the Court in *Hill* made it clear that *Cohen* did not create an unlimited or absolute right to engage in offensive expression, but rather a qualified right that is bounded and confined by contextual factors.

In particular, one of the contextual factors the Court in *Hill* emphasized was whether or not the unwilling audience members and recipients of the speech could effectively exercise a self-help remedy of

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163. *Id.* at 707.
164. *Id.* at 707 n.1.
165. *See supra* Part II.A.4.
166. *Hill*, 530 U.S. at 708.
167. *Id.* at 714.
168. *Id.* at 716.
169. *Id.* (quoting Cohen v. California, 403 U.S. 15, 21–22 (1971)).
170. *See supra* Part II.A.1.
171. *See supra* Part II.A.2.

avoiding the speech or, in contrast, whether they were captive audiences unable to escape the speech. Once again quoting *Cohen*, Justice Stevens wrote that "[e]ven in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[172] In other words, one can simply look away from a written message like Paul Robert Cohen's distasteful phrase if one so chooses.

But unlike in *Cohen*, the unwilling audience members in *Hill* were attempting to do more than just avoid speech; they were attempting to access a medical facility with unobstructed passage and, as such, could not avoid the messages.[173] *Cohen* thus becomes a counter-factual foil, as it was in *Fraser*,[174] both because the degree of captivity, as it were, in *Hill* was greater and because an additional right—a right of access to medical facility—was at stake. As Justice Stevens wrote:

> The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range, *i.e.*, within eight feet. In offering protection from that harm, while maintaining free access to heath clinics, the State pursues interests constitutionally distinct from the freedom from unpopular speech . . . .[175]

The majority ultimately affirmed the Colorado Supreme Court's decision upholding the constitutionality of the statute.[176]

In a dissenting opinion joined by Justice Clarence Thomas, Justice Antonin Scalia deployed *Cohen* to suggest the Colorado statute

172. *Hill*, 530 U.S. at 716 (quoting *Cohen v. California*, 403 U.S. at 21).
173. *Id.* at 717–18.
174. *See supra* Part II.A.2.
175. *Hill*, 530 U.S. at 718 n.25.
176. *Id.* at 735.

was unconstitutional.[177] "[W]e have never made the absurd suggestion that a pedestrian is a 'captive' of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly by," Scalia wrote, quoting *Cohen's* logic that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"[178] In a separate dissent, Justice Anthony Kennedy also cited *Cohen* as militating against the statute's constitutionality, writing that citizens in a public venue typically "bear the burden of disregarding unwelcome messages."[179] Kennedy thus ultimately concluded that "[g]iven our traditions with respect to open discussion in public fora, this statute, which sweeps so largely on First Amendment freedoms, cannot be sustained."[180]

Hill thus also demonstrates that *Cohen* can be interpreted in multiple ways within the same case and used selectively by Justices to justify either majority or dissenting opinions. For the majority in *Hill*, *Cohen* was a counter-factual foil, while for dissenters Scalia and Kennedy, it provided a point of similar comparison.

7. *Lawrence v. Texas*[181]

In 2003, the Supreme Court declared unconstitutional a Texas anti-sodomy statute targeting same-sex couples[182] and, in the process, overruled its 1986 decision in *Bowers v. Hardwick*[183] that had upheld a similar Georgia statute.[184] In writing the majority opinion in *Lawrence v.*

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177. *Id.* at 753 n.3 (Scalia, J., dissenting).

178. *Id.* (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975)).

179. *Id.* at 772 (Kennedy, J., dissenting).

180. *Id.* at 779–80.

181. 539 U.S. 558 (2003).

182. *See id.* at 581 (O'Connor, J., concurring in judgment) (observing that "[s]odomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited . . . .").

183. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

184. *Lawrence*, 539 U.S. at 566.

Texas, Justice Kennedy opened by reasoning that "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[185]

This assertion explicitly bridges the freedoms of speech and intimate sexual conduct as fundamental liberties that demand individual autonomy. It is a point to which Kennedy would return later in *Lawrence*, writing that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[186] Engaging in a certain act of sexual conduct, in other words, is a form of symbolic expression[187]—an expression not only of one's sexual identity and preference, but also of a bond with another person.

In addition, Justice O'Connor's concurring opinion in *Lawrence* rejected the notion that the government can use morality as a sufficient justification to suppress intimate sexual conduct between consenting adults. In particular, she wrote that "[m]oral disapproval of a group cannot be a legitimate governmental interest,"[188] thus rebuffing Texas' argument that its anti-sodomy statute "furthers the legitimate governmental interest of the promotion of morality."[189] O'Connor reinforced this point, writing that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient

185. *Id.* at 562.

186. *Id.* at 567.

187. *See* Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam) (suggesting that activity may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" if there is both "[a]n intent to convey a particularized message" and when "in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it"); *see also* Bar-Navon v. Brevard Cnty. Sch. Bd., 290 F. App'x 273, 275 (11th Cir. 2008) (per curiam) (noting that it "is not disputed" that "the First Amendment protects symbols and conduct that constitute 'symbolic speech'").

188. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in judgment).

189. *Id.* at 582.

rationale under the Equal Protection Clause[190] to justify a law that discriminates among groups of persons."[191]

Although *Cohen* dealt with freedom of expression and is not directly cited in *Lawrence*, it nonetheless arguably provides the foundational logic upon which Kennedy's reasoning in *Lawrence* is rooted. In *Cohen*, the Court specifically rejected California's argument that it could jettison the word "fuck" from the public vocabulary under the "general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."[192] Justice Harlan wrote in *Cohen* that "so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected."[193] In other words, more than thirty years before the Court in *Lawrence* rejected the government's asserted interest in policing public morality in the realm of sexual conduct engaged in by adults, it rejected in *Cohen* the government's interest in policing public morality in the realm of speech engaged in by adults.

Furthermore, prior to Justice Kennedy's emphasis in *Lawrence* upon what he dubbed as "an autonomy of self,"[194] *Cohen* laid the groundwork for this vein of thought when Justice Harlan wrote that "the Constitution leaves matters of taste and style so largely to the individual."[195] While Paul Robert Cohen's "taste and style"[196] of speech may have constituted what Harlan dubbed an "annoying instance of individual distasteful abuse of a privilege"[197]—namely, the First Amendment freedom of speech—tolerance of such individual expression

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190. The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

191. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in judgment).

192. Cohen v. California, 403 U.S. 15, 22–23 (1971).

193. *Id.* at 18.

194. *Lawrence*, 539 U.S. at 562 (majority opinion).

195. *Cohen*, 403 U.S. at 25.

196. *Id.*

197. *Id.*

is "not a sign of weakness but of strength."[198] This echoes the late University of Pennsylvania Professor C. Edwin Baker's argument that speech must be protected not only "as a means to a collective good but because of the value of speech conduct to the individual."[199] More fully explicated, as Professor Edward J. Eberle writes:

> Intrinsically, free speech is valuable because it promotes and reflects human personality and is an essence of human dignity. Autonomy to think, listen, and speak for oneself is essential to a free and self-determining human being. Free speech theorists have captured aspects of this justification for expression as resting on a basis of individual self-fulfillment, self-realization, or liberty.[200]

Viewed in this light, Cohen's speech was important to realizing his own identity as an anti-draft and anti-war protestor, regardless of whether he influenced society's views on the merits, or lack thereof, of either issue. Likewise, John Geddes Lawrence and Tyron Garner, the appellants in *Lawrence*, realized their own sexual identity by being allowed to engage in the intimate conduct of their choice. Put more directly, *Cohen* involved self-realization through words, while *Lawrence* involved self-realization through conduct.

A close reading of *Cohen* also reveals that, at its heart, it is a decision about individual dignity and the recognition that we live in a diverse society that requires toleration of others. In particular, the Court observed that freedom of expression "is powerful medicine in a society as diverse and populous as ours"[201] and that tolerating a strong dose of it "comport[s] with the premise of individual dignity and choice upon which our political system rests."[202] Justice Harlan's bold assertion that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us"[203] demands

198. *Id.*

199. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

200. Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 960–61 (2004) (footnotes omitted).

201. *Cohen*, 403 U.S. at 24.

202. *Id.*

203. *Id.* at 25.

that we tolerate the speech of others, even if it makes us, as he put it, "squeamish."[204]

Thus, while *Cohen* taught American society to tolerate diverse expository choices, *Lawrence* taught American society to tolerate diverse sexual lifestyle choices, even if they are not, to quote *Cohen*, "palatable to the most squeamish among us."[205] Ultimately, if *Cohen* is viewed as a case about autonomous decision-making in the use of sexually explicit expression that might offend some people and, in turn, *Lawrence* is viewed as a case regarding autonomous decision-making in engaging in sexually explicit conduct that also might cause offense, then Justice Kennedy ably and artfully bridges them in *Lawrence* by recognizing that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, *expression*, and certain *intimate conduct*."[206]

With these seven Supreme Court opinions illustrating the use and influence of *Cohen* on the High Court's free speech jurisprudence since 1971 in mind, the article now turns to uses of *Cohen* by lower courts.

B. Cohen*'s Influence on Selected Lower Court Rulings*

The influence and impact of *Cohen* have been, as this section of the article suggests, powerful in both very recent cases and older lower court opinions. Several examples below help to demonstrate this point.

1. Illustrating the Shock Value in First Amendment Jurisprudence

Thirty-nine years after the Supreme Court handed down its ruling in *Cohen v. California*, the United States Court of Appeals for the Fourth Circuit made good use of it to support its 2010 ruling in *Ostergren v. Cuccinelli*.[207] The case centered on a privacy rights advocate named Betty Ostergren, who posted on her website Virginia land records that she had lawfully obtained via a remote-access Internet-based system and that revealed individual Social Security numbers

204. *Id.*
205. *Id.*
206. Lawrence v. Texas, 539 U.S. 538, 562 (2003) (emphasis added).
207. 615 F.3d 263 (4th Cir. 2010).

("SSNs").[208] Although she easily could have blacked out or redacted the SSNs and thus protected individuals from possible identity theft, Ostergren sought "to publicize her message that governments are mishandling SSNs and generate pressure for reform."[209] As she explained in an affidavit, "seeing a document containing an SSN posted on my website makes a viewer understand instantly, at a gut level, why it is so important to prevent the government from making this information available on line [sic]."[210] She added "that merely explaining the problem lacks even 'one-tenth the emotional impact that is conveyed by the document itself, posted on the website.'"[211]

In ruling in favor of Betty Ostergren's First Amendment right to post lawfully obtained SSNs, the Fourth Circuit rejected Virginia's argument that requiring fractional redaction of SSNs by Ostergren before she posted the land records was the appropriate way to strike a balance between free speech and informational privacy concerns[212]. The appellate court reasoned that "partial redaction would diminish the documents' *shock value* and make Ostergren less credible because people could not tell whether she or Virginia did the partial redaction."[213] It added that "[t]he unredacted SSNs on Virginia land records that Ostergren has posted online are integral to her message. Indeed, they *are* her message. Displaying them proves Virginia's failure to safeguard private information and powerfully demonstrates why Virginia citizens should be concerned."[214]

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208. *Id.* at 266–68.

209. *Id.* at 269.

210. *Id.* (quoting Joint Appendix at 89, *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010)).

211. *Id.*

212. *Id.* at 271. Daniel Solove and Paul Schwartz observe that "[i]nformation privacy concerns the collection, use and disclosure of personal information. Information privacy is often contrasted with 'decisional privacy,' which concerns the freedom to make decisions about one's body and family." DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA 1 (2008). "[D]ecisional privacy," in contrast, is "the right to make certain profoundly personal decisions, such as those concerning contraception, abortion, or marriage, free from government intrusion." Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1045 (2009).

213. *Ostergren*, 615 F.3d at 272 n.8 (emphasis added).

214. *Id.* at 271.

The lynchpin of logic underlying the Fourth Circuit's privileging of what it called the "shock value"[215] of speech came directly from *Cohen*. In particular, the appellate court wrote:

> Virginia argues that Ostergren could redact several digits from each SSN and still express her message. But the First Amendment protects Ostergren's freedom to decide how her message should be communicated. Although wearing a jacket bearing the words "Boo for the Draft" rather than "Fuck the Draft" may convey the same political critique, the Supreme Court found that the government cannot prohibit the more offensive version.[216]

The Fourth Circuit then went on to directly quote Justice Harlan's recognition in *Cohen* in that "words are often chosen as much for their emotive as their cognitive force."[217] The bottom line for the Fourth Circuit, then, is that while Betty Ostergren could have chosen more tame and discreet ways of informing the public about her concerns with Virginia's online land record system that did not jeopardize privacy rights, the Supreme Court's decision in *Cohen* left that decision up to her and not to the government.

In addition to the Fourth Circuit, other courts have used *Cohen* to emphasize that the emotive function of speech deserves First Amendment protection.[218]

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215. *Id.* at 272 n.8.

216. *Id.* at 271 n.8.

217. *Id.* at 272 n.8 (quoting Cohen v. California, 403 U.S. 15, 26 (1971)).

218. *See, e.g.*, Johnson v. Campbell, 332 F.3d 199, 212–13 (3d Cir. 2003) (citing *Cohen*, 403 U.S. at 25–26); Bazaar v. Fortune, 476 F.2d 570, 576 (5th Cir.) (finding "relevant" the fact that the High Court in *Cohen* "refused to sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated"), *aff'd as modified*, 489 F.2d 225 (5th Cir. 1973) (per curiam); Tollett v. United States, 485 F.2d 1087, 1096 n.20 (8th Cir. 1973) (describing the dangers of self-censorship that can stifle "original thought and expression of *utilitarian emotions*," and quoting *Cohen*, in support of this assertion, for the proposition that "'words are often chosen as much for their emotive as their cognitive force'" (quoting *Cohen*, 403 U.S. at 26)) (emphasis added)).

2. Demonstrating Statutory Vagueness Problems and Illustrating Related Problems of Governmental Line Drawing

Beyond protecting the shock value in speech, *Cohen's* reasoning that "one man's vulgarity is another's lyric"[219] provides the logic that allows courts today to strike down state statutes similar to the one under which Paul Robert Cohen was prosecuted and convicted in California. For instance, in January of 2011 a superior court judge in Orange County, North Carolina, declared unconstitutionally vague a state statute providing that "[i]f any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a Class 3 misdemeanor."[220] In a "three-page ruling,"[221] Judge Allan Baddour reasoned that "[t]here is no longer any consensus, if there ever was, on what words in the modern American lexicon are 'indecent' or 'profane.' A reasonable person cannot be certain before she acts that her language is not violative of this law, and it is therefore unconstitutionally vague."[222]

Cohen's more general lessons about the difficulty of government line drawing when it comes to deciding what speech is protected and what speech falls outside the ambit of First Amendment protection was illustrated in a 2010 opinion by the United States Court of Appeals for the Ninth Circuit in *United States v. Alvarez*.[223] The case centered on the constitutionality of the Stolen Valor Act of 2005[224] that, as the Ninth Circuit wrote, "imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or

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219. *Cohen*, 403 U.S. at 25.

220. N.C. GEN. STAT. § 14-197 (2009), *invalidated by* State v. Elabanjo, No. 09 CRS 54172 (Orange Cnty. Super. Ct. Jan. 5, 2011), http://www.acluofnc.org/files/1%205%2011%20Order%20Granting%20Motion%20to%20Dismiss.pdf.

221. *See* Anne Blythe, *Cursing Ban Struck Down*, NEWS & OBSERVER, Jan. 8, 2011, at A1, *available at* http://www.newsobserver.com/2011/01/08/906506/cursing-ban-struck-down.html.

222. Tom Breen, *Judge Strikes Down NC Ban on Public Profanity*, ASSOC. PRESS ONLINE, Jan. 8, 2011, http://cnsnews.com/news/article/judge-strikes-down-nc-ban-public-profanity.

223. 617 F.3d 1198 (9th Cir. 2010), *cert. granted*, No. 11-210, 2011 WL 3626544, (Oct. 17, 2011).

224. 18 U.S.C. § 704 (2006) *invalidated by Alvarez*, 617 F.3d 1198.

may be perceived as, a false statement of fact — without anything more."[225] In particular, the Act provides, in relevant part, that:

> [w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.[226]

In September 2007, Xavier Alvarez was charged in federal court with, according to the U.S. Department of Justice's official press release in the matter, "falsely claiming to have been awarded the Congressional Medal of Honor."[227] Alvarez responded by challenging the validity of the Stolen Valor Act under the First Amendment.[228]

In seeking to uphold the Act, the government argued that "there is no protection for false statements of fact unless it can be shown, in a particular case, that there should be."[229] In rejecting this approach, which would have shifted and foisted the burden on the speaker to prove that speech merits protection rather than on the government to prove that it does not deserve shelter,[230] the two-judge majority of the Ninth Circuit reasoned:

> Placing the presumption in favor of regulation, as the government and dissent's proposed rule does, would steadily undermine the foundations of the First Amendment. In *Cohen v. California*, the

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225. *Alvarez*, 617 F.3d at 1200.

226. 18 U.S.C. § 704 (b) (2006) *invalidated by Alvarez*, 617 F.30 1198.

227. Press Release, U.S. Dep't of Justice, Water District Board Member Charged With Lying About Receiving Congressional Medal of Honor (Sept. 26, 2007), *available at* http://www.justice.gov/usao/cac/Pressroom/pr2007/121.html.

228. *Alvarez*, 617 F.3d at 1201.

229. *Id.* at 1203.

230. *See id.* at 1204 (observing that "under the government's proposed approach, it would effectively become the speaker's burden to prove that his false statement should be protected from criminal prosecution. That approach runs contrary to Supreme Court precedent.").

> Court rejected state regulation of profanity because "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" 403 U.S. 15, 25, 19 S. Ct. 1780, 29 L. Ed. 2d. 284 (1971). This case is to that extent analogous. How, based on the principle proposed by the government, would one distinguish the relative value of lies about one's receipt of a military decoration from the relative value of any other false statement of fact?[231]

Resting in part upon this logic, as well as on another citation to *Cohen* for the proposition that society sometimes must put up with an "annoying instance of individual distasteful abuse of a privilege"[232] like free speech, the majority ultimately held the Act unconstitutional.[233]

3. Influencing the Scope of the Fighting Words Doctrine

Cohen also has proven useful to many lower courts[234] when defining speech that constitutes "fighting words"[235] that fall outside the scope of First Amendment protection.[236] In *Cohen*, the High Court described fighting words as "those personally abusive epithets which,

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231. *Id.*

232. *Id.* at 1205 (citing Cohen v. California, 403 U.S. 15, 24–25 (1971)).

233. *Id.* at 1218.

234. *See infra* note 249 (providing examples of such cases using *Cohen* to help articulate the parameters of the fighting words doctrine).

235. The United States Supreme Court wrote nearly seventy years ago:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or *"fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*

Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (emphasis added).

236. *See* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1138 (1994) (describing fighting words as "a category of expression historically unprotected by the First Amendment").

when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[237] It added in *Cohen* that fighting words encompass only speech amounting to "a direct personal insult."[238] Mere offensive speech standing alone—the deployment of the word "fuck" in a political context—therefore did not rise to the level of fighting words in *Cohen*, as the Court reasoned that "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[239]

Cohen's interpretation and constraint on the aging and controversial[240] fighting words doctrine most recently played a key role in the 2011 decision of the Supreme Court of Arizona in *In re Nickolas S.*[241] The case pivoted on whether a minor who "insulted a teacher with derogatory and offensive words (and was suspended from school for doing so)"[242] could be adjudicated as a delinquent under an Arizona statute that makes it a crime to "'knowingly abuse[]' teachers [and] other school employees."[243] Observing that "when pure speech is involved, the statute applies only to 'fighting words,'"[244] the Arizona high court framed the issue before it as "whether this case involves fighting words as defined by the United States Supreme Court."[245]

Directly citing *Cohen*, the Supreme Court of Arizona observed that the U.S. Supreme Court "has held that fighting words must be directed personally to an addressee and that words may not be proscribed merely to maintain a suitable level of discourse or because they may tend

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237. *Cohen*, 403 U.S. at 20.

238. *Id.*

239. *Id.*

240. *See generally* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 444 (2004) (criticizing the fighting words doctrine as "a category so ill-conceived that not once in the ensuing sixty-two years has the United States Supreme Court upheld a conviction based on it" and contending that "[t]here is no constitutional basis for denying protection to fighting words, either alone or as a subcategory of speech claimed to be unworthy of First Amendment protection").

241. 245 P.3d 446 (Ariz. 2011).

242. *Id.* at 447.

243. *Id.* (quoting ARIZ. REV. STAT. § 15–507 (2009)).

244. *Id.*

245. *Id.*

to provoke a violent reaction."[246] It also cited *Cohen* for the proposition that "[t]he underlying rationale for the fighting words doctrine is that some speech may be suppressed because it would likely provoke an immediate violent reaction by the person to whom it is addressed."[247] Applying these principles, the Supreme Court of Arizona concluded that the speech at issue in *In re Nickolas S.* did not rise to the level of fighting words.[248]

Other courts too have used *Cohen* to articulate the parameters of fighting words.[249] For instance, when U.S. Magistrate Judge Kenneth P. Neiman was called upon in 2004 in *Levine v. Clement*[250] to define and apply the fighting words doctrine, he wrote, "as in *Cohen*, the simple use of obscenities did not transform Plaintiff's 'offensive' speech into fighting words."[251] In this case, defendant Deborah Clement, an officer with the Holyoke, Massachusetts, police department, arrested Robert Levine on disorderly conduct charges after Levine allegedly "used the

246. *Id.* at 451 (citing Cohen v. California, 403 U.S. 15, 20, 23–24 (1971)).

247. *Id.* at 452.

248. *Id.* In particular, the Arizona high court reasoned:

> Nickolas vulgarly insulted the teacher from about ten feet away by calling her a "fucking bitch"; he repeated this insult and also shouted "stupid bitch" while leaving the classroom, and he then again shouted "fucking bitch" in the hallway while the teacher was watching him from the classroom door. Considering the circumstances in which Nickolas uttered his words, we do not believe that his insults would likely have provoked an ordinary teacher to "exchange fisticuffs" with the student or to otherwise react violently.

Id.

249. *See, e.g.*, Cannon v. City & County of Denver, 998 F.2d 867, 873 (10th Cir. 1993) (finding *Cohen* "instructive" on clarifying the scope of the fighting words doctrine); Ricker v. Weston, No. CIV.A. 99–5879, 2000 WL 1728506, at *14 (E.D. Pa. Nov. 21, 2000), *rev'd*, 27 F. App'x 113 (3d 2004) (quoting *Cohen* on fighting words); Commonwealth v. Welch, 825 N.E.2d 1005, 1017 (Mass. 2005) (citing *Cohen* in interpreting the sweep of the fighting words doctrine); People v. Prisinzano, 648 N.Y.S.2d 267, 273 (Crim. Ct. N.Y. 1996) (citing *Cohen* as standing for the point that "even insulting or offensive words may have expressive value and are not 'fighting words' unless uttered as direct personal insults likely to provoke violent reaction in the ordinary citizen").

250. 333 F. Supp.2d 1 (D. Mass. 2004).

251. *Id.* at 5.

words 'fuck' and 'fucking'"[252] when disparaging the Canadian flag as it was being displayed during the City of Holyoke's annual St. Patrick's Day parade in 2003.[253] Levine sued, alleging a violation of his First Amendment right of free speech.[254] Levine asserted that his remarks were intended "as a comment on the lack of Canadian support for U.S. military action in Iraq."[255] The political opinions were, as in *Cohen*, not directed at any individual; the only reaction was "that some 'people' stopped looking at the parade and looked at [Levine], asking him to be quiet[,]"[256] and "[h]e offered no physical resistance after he was informed he was under arrest."[257] Officer Clement thus had to concede that Levine's speech did not fit within the category of fighting words and, in turn, that the disorderly conduct arrest based upon Levine's speech was improper.[258]

4. Illustrating That Context is Key for Speech Protection and The Right to be Free From Unwanted Speech

In addition to using *Cohen* to flesh out the fighting words doctrine, lower courts have deployed it to demonstrate that the context in which speech occurs makes a key difference on whether or not it is protected. As described earlier,[259] the Supreme Court in *Cohen* observed that privacy expectations and, in particular, a privacy right to avoid contact with unwanted speech depends directly on where the speech takes place.[260]

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252. *Id.* at 3. Levine denied that he used the words, but he did not dispute it for purposes of the summary judgment motion before Magistrate Neiman. *Id.* at 3 n.2.

253. *Id.* at 2–3.

254. *Id.* at 2.

255. *Id.*

256. *Id.* at 3.

257. *Id.*

258. *Id.* at 5.

259. *Supra* notes 67–68 and accompanying text.

260. Justice Harlan wrote for the *Cohen* majority:

> [P]ersons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting

In 2004, the United States Court of Appeals for the Sixth Circuit in *Anderson v. Spear*[261] cited *Cohen* to support the proposition that "[t]he Supreme Court generally has resisted the invitation to extend to public spaces the limited right of individuals to be left alone *inside* their homes, even when the messages may prove to be offensive to the listener."[262] The Sixth Circuit observed that in *Cohen*, the Court held that "the risk of offense was not a basis for restricting the ability of a speaker to wear a jacket adorned with a vulgar message in a courthouse, but rather that those offended may overt [sic] their eyes."[263] The appellate court thus characterized *Cohen* as "instructive regarding the limits of the right to be left alone . . . ."[264] Applying these principles to the constitutionality of Kentucky laws affecting the distribution of literature near polling places, the Sixth Circuit wrote in *Anderson*:

> If the right to be left alone provides an insufficient basis for the states to restrict the display of profanity in the courtroom or Nazis marching down residential streets occupied by objecting holocaust survivors,[265] then the State's interest in assuring that voters are not subjected to any unwanted campaign speech alone cannot be a sufficient basis to regulate that clearly protected speech.[266]

> their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.

Cohen v. California, 403 U.S. 15, 21–22 (1971).

261. 356 F.3d 651 (6th Cir.), *cert. denied*, Stumbo v. Anderson, 543 U.S. 956 (2004).

262. *Id.* at 660.

263. *Id.* The author of this article has added the "[sic]" notation in the text corresponding to this footnote because the actual quotation from *Cohen* refers not to "overting" their eyes, but to "averting their eyes." *Cohen*, 403 U.S. at 21.

264. *Anderson*, 356 F.3d at 661.

265. This is a reference to the High Court's ruling in Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

266. *Anderson*, 356 F.3d at 661.

Thus, as in *Pacifica Foundation*[267] and *Fraser*,[268] the appellate court in *Anderson* used *Cohen* to illustrate that the protection speech receives—and the right of the audience to be free from unwanted expression—is necessarily a contextually driven inquiry.

5. Offensiveness Does Not Equal Obscenity

One of the initial items that Justice Harlan addressed in *Cohen* was whether or not the speech at issue was obscene.[269] While the word "fuck" may have a sexual meaning of copulation,[270] the High Court quickly dismissed the possibility that Paul Robert Cohen's jacket was obscene, reasoning:

> Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.[271]

This line of logic proved instructive for the United States Court of Appeal for the Fifth Circuit in *McNamara v. Moody*.[272] The case pivoted on the censorship by prison officials of inmate John P. McNamara's letter to his girlfriend that "dealt in large part with McNamara's discontent with the prison mail censorship system, but it also charged that the mail censoring officer, while reading mail, engaged in masturbation and 'had sex' with a cat."[273]

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267. 438 U.S. 747 (1978). *See supra* Part II.A.1.

268. 478 U.S. 675 (1986). *See supra* Part II.A.2.

269. Cohen v. California, 403 U.S. 15, 20 (1971).

270. *See* Christopher Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1719 (2007) (observing that "*[f]uck* is a highly varied word. While its first English form was likely as a verb meaning to engage in heterosexual intercourse, *fuck* now has various verb uses, not to mention utility as a noun, adjective, adverb, and interjection.") (citations omitted).

271. *Cohen*, 403 U.S. at 20 (citation omitted).

272. 606 F.2d 621 (5th Cir. 1979).

273. *Id.* at 623. The part of the letter that landed McNamara in trouble stated:

In examining whether or not the censorship of the letter violated the First Amendment speech rights of inmate McNamara, the Fifth Circuit considered the argument of prison official J.C. Moody that the letter was obscene.[274] Citing and quoting from *Cohen*,[275] the appellate court wrote about the letter, "Vulgar it is; obscene it is not."[276] It added that judged by *Cohen's* standard, "the inmate's letter in this case is not obscene."[277]

In addition to this list of five different ways in which *Cohen* has influenced lower court opinions over the past four decades, the case also has been used by the judiciary to support: (1) the proposition that "the First Amendment protects more than oral expression[;]"[278] (2) the idea that "the government may not restrict speech because there may be a

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> I wish I could write w/o some perverted dung-hole reading my words, but such is not the case. It is really a shame that there are those who have such a blah ! life that they must masturbate themselves while they read other people's mail. I don't think the guy is married; however, one of the freeman told me the other day that he has a cat and that he is suspected of having relations of some sort with his cat. If the shoe fits him, watch him blush the next time we see him. I'll point him out to you and you can laugh at him. "Look, honey. There goes that pervert who has sex with a cat and masturbates while reading other people's mail." This is what I think of him. These are my thoughts, and I am entitled to them.

Id. at 623 n.2.

274. *Id.* at 624.

275. The appellate court quoted *Cohen's* observation that:

> [w]hatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. . . . It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation . . . .

Id. at 624 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

276. *Id.*

277. *Id.*

278. Higher Taste v. City of Tacoma, 755 F. Supp. 2d. 1130, 1134 (W.D. Wash. 2010) (citing *Cohen*, 403 U.S. 15); *see also* Sefick v. City of Chicago, 485 F. Supp. 644, 648 n.11 (N.D. Ill. 1979) ("The concept of constitutionally protected speech has been expanded beyond the bounds of mere oral expression.") (citing *Cohen*, 403 U.S. 15)).

negative reaction to that speech by members of the public[;]"[279] (3) the argument that the government may not use the pretext of targeting some speech in order to quash critical viewpoints with which it disagrees;[280] and (4) the principle that "[t]he use of the word 'fuck' displayed to the public is protected speech"[281] and, more generally, that "the Constitution

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279. San Diego Minutemen v. Cal. Bus., Transp. & Hous. Agency's Dep't of Transp., 570 F. Supp. 2d 1229, 1252 (S.D. Cal. 2008) (citing *Cohen* as used by the Ninth Circuit in Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 969 (9th Cir. 2002)).

280. For instance, a federal appellate court in 1983 considered whether a Mennonite was improperly indicted for failure to register for the draft because he exercised his First Amendment right of free speech in a letter to the Selective Service in which he not only confessed to the agency his intent not to register, but also expressed his disagreement with the draft under religious and political grounds. United States v. Schmucker, 721 F.2d 1046, 1048 (6th Cir. 1983), *vacated*, 471 U.S. 1001 (1985). The appellate court, quoting *Cohen*, wrote:

> "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Similarly in the present case, the defendant claims—with some support in the record—that the government is forbidding criticisms of itself under the guise of prosecuting a form of confessional words.

Id. at 1051 (quoting *Cohen*, 403 U.S. at 26). The Sixth Circuit found *Cohen* to be:

> analogous to the instant case. There the prosecutors argued that the slogan was obscene and contained "fighting" words and therefore was not entitled to protection. The accused argued that the slogan had a political meaning, that he used the obscenity to dramatize that meaning. The court held that the two characterizations merged and that the context of the prosecution suggested a strong inference that the state brought the case in part because of the political meaning of the slogan. This case lends itself to similar analysis. The prosecution argues "confession," and the accused argues political and religious "protest."

Id.

281. Stone v. Juarez, No. CIV 05-508 JB/RLP, 2006 WL 1305039, at *13 (D. N.M. Apr. 23, 2006) (citing *Cohen*, 403 U.S. at 26).

protects vulgar language and profanity"[282] and "speech that many, even a majority, find offensive."[283]

In summary, Section A has illustrated Cohen's influence on seven major Supreme Court rulings, while Section B has demonstrated Cohen's effect, in multiple ways, on many lower court rulings. With this in mind, the article now concludes by addressing some of the ways in which Cohen may be affected in the digital age.

CONCLUSION

In the *New York Times'* obituary for Justice Harlan, who passed away at age seventy-two, less than seven months after *Cohen* was decided, Professor Yale Kamisar described Harlan's majority opinion in the case as "probably one of the great opinions ever written on freedom of expression."[284] And although the case has its detractors, apparently including Justice Thomas,[285] Kamisar was not alone in this glowingly positive assessment of Harlan's opinion. Professor William Van Alstyne captures well the essence of *Cohen* when he calls it:

> a distinctly "American" freedom of speech case — strong, uncompromised, committed to a risk-taking (rather than a risk-averse) First Amendment, confident in the end as against the more collapsed and constrained regimes in countries with weaker first amendments than ours. The opinion exhibits a confidence in central principles of free speech . . . .[286]

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282. State v. Poe, 88 P.3d 704, 715 (Idaho 2004).

283. Dible v. City of Chandler, 515 F.3d 918, 933 (9th Cir. 2008) (Canby, J., concurring).

284. Lesley Oelsner, *Harlan Dies at 72; On Court 16 Years*, N.Y. TIMES, Dec. 30, 1971, at A1.

285. In 2001, Justice Thomas wrote, "I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, *wearing profane jackets*, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend." Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 466 (2001) (Thomas, J., dissenting) (emphasis added).

286. William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1657 (1996).

This article has demonstrated the multiple ways in which this confident, American free speech opinion has been employed over the past forty years by the U.S. Supreme Court and lower judicial bodies.[287] The question now becomes whether the case will continue to have such influence and whether the principles that it teaches about freedom of expression will remain viable in the coming decades.

This is a particularly intriguing question on the fortieth anniversary of the case in light of President Barack Obama's January, 2011 speech at the University of Arizona in the aftermath of the killing of a federal judge and wounding of a U.S. Congresswoman.[288] Much initial media coverage involved the issue of whether the killings should be blamed on the heated rhetoric of politicians like erstwhile Alaska Governor Sarah Palin and right wing talk show hosts.[289] As a front page

287. *See supra* Part II.

288. *See generally* Shailagh Murray & Sari Horwitz, *Congresswoman Shot in Tucson Rampage: Judge is Among 6 Slain*, WASH. POST, Jan. 9, 2011, at A1 (describing the shootings).

289. As columnist Paul Jenkins wrote:

> The shots were still echoing as the left rushed to politicize the carnage and blame Republicans and conservatives in an attempt to curb guns and free speech. It was Sarah Palin's fault they said, or her silly map targeting Giffords' district. Or Rush Limbaugh's "hate" speech, or Glenn Beck's. Or high-capacity magazines, or guns in general. It was talk radio or TV — even if the suspected shooter's friends said he never watched television or listened to radio; that he could not have cared less about politics. It was heated political rhetoric (never from the left, mind you), or the DREAM Act's failure to win congressional approval. Or maybe the moon was full. But most important, Republicans did it.

Paul Jenkins, *Left Exploits Tragedy; Only One Person is to Blame*, ANCHORAGE DAILY NEWS, Jan. 15, 2011, at B7. *See* Ross Baker, *Let's Be Careful with Cause and Effect in Tucson*, USA TODAY, Jan. 11, 2011, at 10A (observing that "[t]hose who blame the news media — specifically the 24-hour news channels and their incendiary commentators — will also be able to make a plausible case that inspiration for [Jared] Loughner can be found in the words of people such as Glenn Beck or his radio counterpart Rush Limbaugh"); Dana Milbank, *A McKinley Moment?*, WASH. POST, Jan. 11, 2011, at A21 (calling the heat placed on both Sarah Palin and Glenn Beck after the Arizona shooting as "well deserved. Both are finally being held to account for recklessly playing with violent images in a way that is bound to incite the unstable."). *See generally* David M. Herszenhorn, *After Attack,*

New York Times article put it the day after the shooting, the tragedy "quickly focused attention on the degree to which inflammatory language, threats and implicit instigations to violence have become a steady undercurrent in the nation's political culture."[290]

In light of this attention, President Obama stated that:

> at a time when our discourse has become so sharply polarized — at a time when we are far too eager to lay the blame for all that ails the world at the feet of those who happen to think differently than we do — it's important for us to pause for a moment and make sure that we're talking with each other in a way that heals, not in a way that wounds.[291]

The President went on to say that what "we cannot do is use this tragedy as one more occasion to turn on each other,"[292] and added that "[i]f this tragedy prompts reflection and debate — as it should — let's make sure it's worthy of those we have lost. Let's make sure it's not on the usual plane of politics and point-scoring and pettiness that drifts away in the next news cycle."[293]

While President Obama counsels for what amounts to self-censorship in tone and tenor of political discourse, *Cohen* provides the antithetical framework that allows for the type of heated and offensive

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Focus in Washington on Civility and Security, N.Y. TIMES, Jan. 9, 2011, *available at* http://www.nytimes.com/2011/01/10/us/politics/10capital.html (observing that "[f]or Democrats, the challenge is how to voice their suspicion that overheated rhetoric, especially from the right, is leading to threats and actual violence without being perceived as blaming Republicans for what may have been the act of a lone madman," and describing both parties in the days after the attack as beginning "a wrenching process of soul-searching about the tone of political discourse and wonder[ing] aloud if a lack of civility had somehow contributed to the bloodshed in Tucson").

290. Carl Hulse & Kate Zernike, *Bloodshed Puts New Focus on Vitriol in Politics*, N.Y. TIMES, Jan. 9, 2011, at A1.

291. Barack Obama, President of the United States, Remarks by the President at a Memorial Service for the Victims of the Shooting in Tucson, Arizona (Jan. 12, 2011) (transcript *available at* http://www.whitehouse.gov/the-press-office/2011/01/12/remarks-president-barack-obama-memorial-service-victims-shooting-tucson).

292. *Id.*

293. *Id.*

political rhetoric on issues of public concern that arguably pervades and permeates punditry and discourse today. Indeed, *Cohen* and, later, *Johnson*,[294] make it clear that when it comes to political expression, we must tolerate offensive, disagreeable and shocking speech and viewpoints.

This means, of course, that only a voluntary subscription to the unwritten rules of a more civilized form of discourse will realize President Obama's laudable attempt to quell heated political vitriol today. To state the obvious, the Supreme Court will not suddenly overrule *Cohen* now simply because the executive branch wants to see a mellowing of political debate. Certainly with the right of the free expression may come an ethical obligation to use it responsibly, but the Supreme Court has long recognized that abuse of the privilege is inevitable and generally must be tolerated.[295] With *Cohen*, as Amherst College Professor Hadley Arkes wrote back in 1974, the Court "resolved for the first time that the *preservation of civility was simply not substantial enough as an interest* of the state to warrant any restrictions on speech that had even the slenderest pretense of being 'political.'"[296]

Cohen was forged during the era of a controversial war and during a period of cultural and generational turbulence, coming out of the 1960s' free speech movement.[297] If free speech is to mean anything

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294. *See supra* Part II.A.4.

295. As the Supreme Court eloquently wrote eighty years ago:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . ?

Near v. Minnesota, 283 U.S. 697, 718 (1931).

296. Hadley Arkes, *Civility and Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 315 (1974) (emphasis added).

297. In fact, when the Supreme Court granted certiorari to hear the case, the *New York Times* observed that the Court had agreed to "confront the 'dirty words' issue that has *arisen frequently in connection with youth protests*." *High Court to Rule on Aid to Church Tied Colleges*, N.Y. TIMES, June 23, 1970, at A18 (emphasis

today—yet another time when the nation is involved in at least two different controversial wars, one geographically bounded in Afghanistan[298] and the other temporally protracted against an enemy called terrorism[299]—then *Cohen's* principles will serve well those who object to U.S. involvement in either or both of those conflicts.

As for the lasting impact of the case in the next forty years, it must be remembered that *Cohen* hinged, in large part, on the context of the speech in question.[300] As Stanford University Professor William Cohen has observed, *Cohen* merely settled the proposition that "a law is unconstitutional if it punishes the use of profanity *in all public places at all times*. It has not resolved the standards applicable to time, place, and manner control of the public use of profanity."[301] There are, Professor Cohen suggested, "nearly [an] infinite number of imaginable factual situations"[302] across which that trio of variables—time, location and manner/mode of expression—can vary.

Paul Robert Cohen, of course, conveyed his speech via a very primitive medium—the written word on an article of clothing—compared with today's high-tech, digital world. Courts now will need to sort out how *Cohen* affects the use of profanity on issues of political concern when the speech is posted on the Internet, transmitted via tweets and texts and bandied about on cable talk shows that are free from the strictures of the FCC's indecency regime.[303] New technologies have only

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added). *See generally* James A. Hijaya, *The Free Speech Movement and the Heroic Moment*, 22 J. AM. STUD. 43 (Apr. 1988) (providing an overview of the free speech movement in Berkeley, Cal.).

298. *See generally* Eric Schmitt, *Taliban Fighters Appear Quieted in Afghanistan*, N.Y. TIMES, Dec. 27, 2010, at A1 (providing a relatively recent report on the U.S. military's ongoing involvement in Afghanistan).

299. *See generally* Thom Shanker, *After Decade of War, Top Officer Directs Military to Take Stock of Itself*, N.Y. TIMES, Jan. 9, 2011, at A20 (observing that the U.S. "military enters its 10th year of war since the Sept. 11 attacks").

300. *See supra* Part II.A.1–2 (describing how context was key in *Cohen*, and illustrating how the Supreme Court contrasted the factual context of *Cohen* with the context in both *Pacifica Foundation* and *Fraser*).

301. Cohen, *supra* note 16, at 1614 (emphasis added).

302. *Id.* at 1603.

303. Federal Communications Commission, Obscenity, Indecency & Profanity —Frequently Asked Questions, http://www.fcc.gov/guides/obscenity-indecency-profanity-faq (last visited Oct. 30, 2011) (noting that "the FCC has enforced the indecency and profanity prohibitions only against conventional broadcast services,

multiplied the number of "imaginable factual situations"[304] to which Professor Cohen referred more than two decades ago. Those technologies are also in the hands of new users—minors, not simply adults—which adds to the complexity surrounding the influence *Cohen* will have in the future.

Finally, for the twin purposes of both humor and scholarly integrity, it is important to note that not all courts that have cited *Cohen* to illustrate legal propositions actually have correctly understood the facts of the case. Notably, in 2000 a federal district court in Arkansas got the pivotal fact of the case wrong, writing that *Cohen* centered on a case involving an individual who, "while in a public building, had the words 'f—k you' displayed on his clothing."[305] Alas, had Paul Robert Cohen's jacket been emblazoned merely with those two words, standing alone and devoid of any anti-government, dissenting political commentary regarding a controversial war and conscription, the U.S. Supreme Court might never have heard the case because, to return full circle to Justice Harlan's fine opening phrase in the opinion, it might have been "too inconsequential to find its way into our books."[306]

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not against subscription programming services such as cable and satellite") (emphasis added).

304. Cohen, *supra* note 16, at 1603.

305. Nichols v. Chacon, 110 F. Supp. 2d 1099, 1104 (W.D. Ark. 2000).

306. Cohen v. California, 403 U.S. 15, 15 (1971).